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No. 83-1646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIBLEY, LINDSAY & CURR CO., A DIVISION OF ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

v.

BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION OF AMERICA, AFL-CIO,

AND

BAKERY & CONFECTIONERY UNION & INDUSTRY INTERNATIONAL PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

HENRY ROSE
General Counsel

BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
Deputy Assistant General Counsel

TERENCE G. CRAIG
DAVID F. POWER
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-8298

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BRIEF *AMICUS CURIAE* FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

1. The first Question Presented by the petition for certiorari in this case—the constitutionality of the pre-enactment application of the Multiemployer Act[1]—is

[1] The Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980), *amending* the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829-1035 (1974), 29 U.S.C. §§ 1301-1481 (1982).

Rule 36.4 of the Rules of this Court authorizes the filing of a brief *amicus curiae*, without the consent of the parties, by "any agency of the United States authorized by law to appear in its own behalf." The Pension Benefit Guaranty Corporation ("PBGC") has such legal authority pursuant to Section 4002(b)(1) of ERISA, 29 U.S.C. § 1302(b)(1).

identical to the issue before this Court in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, No. 83-245, and *Oregon-Washington Carpenters-Employers Pension Trust Fund* v. *R.A. Gray & Co.*, No. 83-291, which were argued in this Court on April 16, 1984. In light of the pendency of issues concerning the statute's pre-enactment application in *R.A. Gray*, the present petition should be held on the Court's docket until the appeals in Nos. 83-245 and 83-291 are decided.[2]

2. The remaining Questions Presented also raise the constitutionality of the Multiemployer Act. There is, however, no conflict among the circuits on any of those questions. The second Question Presented asks whether the Multiemployer Act is unconstitutionally vague. The ruling of the court below on this question is consistent with the rulings of the Fourth Circuit in *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 643 (4th Cir. 1983), and the Seventh Circuit in *Peick* v. *Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1276-77 (7th Cir. 1983).

3. The third, fourth, and fifth Questions Presented are a constitutional attack on the procedures for the assessment, collection, and adjudication of withdrawal liability under the Multiemployer Act (Sections 4219 and 4221 of ERISA, 29 U.S.C. §§ 1399 and 1401). No court has found any aspect of the statutory dispute resolution procedures to be unconstitutional,[3] and this Court need not

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[2] The PBGC similarly recommended this approach in *Carpenters Pension Trust for Southern California* v. *Shelter Framing Corporation and G&R Roofing Company*, No. 83-507; *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, No. 83-541 ("*Republic Industries*"); and *Peick* v. *Pension Benefit Guaranty Corp.*, No. 83-1246 ("*Peick*").

[3] Furthermore, the Court should "refrain from passing upon the constitutionality of an act of Congress unless . . . the question is raised by a party whose interests entitle him to raise it." *Blair* v. *United States*, 250 U.S. 273, 279 (1919), *quoted in Valley Forge*

consider these Questions. *See Republic Industries*, 718 F.2d at 640-642; *Peick*, 724 F.2d at 1277; and *Washington Star* v. *International Typographical Union Negotiated Pension Plan*, No. 83-1313 (D.C. Cir., Mar. 27, 1984) ("*Washington Star*"), slip op. at 18-19.

4. The sixth Question Presented raises the constitutionality under the Due Process Clause of the post-enactment, or "prospective," application of the Multiemployer Act. There is no conflict among the circuits on this constitutional question. Eighteen district courts and two courts of appeals have now sustained the prospective application of the statute against constitutional attack.[4] No court has ruled to the contrary. In light of this uniform precedent, the issue of the statute's prospective application does not warrant this Court's attention.[5]

Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). It is doubtful that petitioner has standing to challenge the constitutionality of procedures in which it has not participated, particularly inasmuch as any such challenge could be mooted if petitioner's statutory arguments were to prevail under those procedures. *See Terson Company, Inc. and Bakery Drivers Local 734 Pension Funds*, 4 Employee Benefits Cases (BNA) 1009, 1015 (Graham, Arb., Feb. 3, 1983) (employer's liability reduced to zero by arbitration, all constitutional challenges mooted and judicial proceeding dismissed).

[4] *See* Brief for Appellant Pension Benefit Guaranty Corporation at 17 n.18, *R.A. Gray*, No. 83-245; *Peick, supra; Washington Star, supra; Dorn's Transportation, Inc.* v. *I.A.M. National Pension Fund*, No. 82-1141 (D.D.C., Jan. 19, 1984); and *Combs* v. *Manor Mines, Inc.*, No. 83-3642 (D.D.C., March 16, 1984).

[5] Should the Court, however, wish to consider a case involving the constitutionality of the statute's prospective application, the PBGC suggests that the *Peick* case is suitable for such consideration. The record is free of any factual disputes which have yet to be resolved through statutorily mandated arbitration procedures (29 U.S.C. § 1401 (1982)), and the issues were thoroughly considered by the two lower courts.

For the foregoing reasons, the petition for a writ of certiorari should be held on this Court's docket to await decision in Nos. 83-245 and 83-291, and to be decided in conformity with this Court's ruling in Nos. 83-245 and 83-291. Certiorari on other issues should then be denied.

Respectfully submitted,

HENRY ROSE
General Counsel

BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
Deputy Assistant General Counsel

TERENCE G. CRAIG
DAVID F. POWER
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PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
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